SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 993

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, *ET AL.*,

Petitioners,

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY TO MEMORANDUM FOR RESPONDENTS IN OPPOSITION

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1. Respondents concede that the petition raises "important issues" and that "*Red Lion* . . . raises constitutional and statutory issues which have close relation to the instant case . . . ." Respondents' Memorandum In Opposition, pp. 3, 9. The thrust of respondents' opposition is that petitioners' concerns can be fully satisfied by *amicus* participation in *Red Lion*.[1] But only by hearing this case together with *Red Lion* will the Court, when it passes on the Commission's personal attack doctrine for the first time, have before it

[1]Petitioners have moved for time for oral argument in *Red Lion*, if certiorari is denied herein.

a broad range of prospective applications of the doctrine and a comprehensive record.

2. Respondents urge that the constitutional questions be considered first in the precise factual context of *Red Lion* because an overall examination of the Commission's rules and its personal attack policy is not appropriate.[2] Petitioners submit that such an overall examination is not only appropriate but required. A rule or policy affecting First Amendment rights of free speech must be tested on its face and not merely as applied in the particular circumstances of *Red Lion* or any other case. See, *e.g., Dombrowski* v. *Pfister,* 380 U. S. 479 (1965); *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58 (1963); *Thornhill* v. *Alabama,* 310 U. S. 88 (1940).

The critical constitutional issue presented both here and in *Red Lion* is the inhibitory before-the-fact effect of the Commission's doctrine on the broadcast of personal attacks in the course of broadcast journalism. This effect must be measured by considering the doctrine on its face, and can best be ascertained in the context of the new rules, rather than an after-the-fact order in a particular case. The new rules, which supersede the earlier policies involved in *Red Lion,* will govern all current and future "personal attacks."[3]

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[2]The United States goes further to suggest that the controversy as to the legality of the Commission's rules may not be ripe for adjudication. Memorandum In Opposition, p. 8, n. 4. (This position we note is attributed to "the United States" rather than "respondents.") Such an argument is foreclosed by decisions of this Court holding that Commission rules may be immediately challenged in the courts by affected parties. *United States* v. *Storer Broadcasting Co.,* 351 U. S. 192 (1956); *Columbia Broadcasting System, Inc.* v. *United States,* 316 U. S. 407 (1942). See also *Abbott Laboratories* v. *Gardner,* 387 U. S. 136 (1967); *Frozen Food Express* v. *United States,* 351 U. S. 40 (1956).

[3]Respondents' suggestion (Memorandum In Opposition, p. 9) that the Commission might "reconsider or possibly revise" its rules after *Red Lion* is decided is not only speculative, but also ignores the continuing suppression of claimed First Amendment rights until such time as the Commission takes further action.

They make changes in the scope of the doctrine and add significant new sanctions for violation. It follows that this case presenting the currently operative rules should be before this Court together with *Red Lion* when the first constitutional test of the doctrine is made.

3. The free speech questions raised in this case deserve prompt review. The deterrent effect of the Commission's new personal attack rules is being inflicted daily on broadcasters. Whatever their force in other contexts, arguments in favor of piecemeal adjudication are inappropriate here. "[T]hose affected by a statute [affecting free speech] are entitled to be free of the burdens of defending prosecutions, however expeditious, aimed at hammering out the structure of the statute piecemeal, with no likelihood of obviating similar uncertainty for others." *Dombrowski* v. *Pfister,* 380 U. S. 479, 491 (1965). "By permitting determination of the invalidity of these statutes without regard to the permissibility of some regulation on the facts of particular cases, . . . [this Court has], in effect, avoided making vindication of freedom of expression await the outcome of protracted litigation." *Id.* at 487.

4. Respondents also advert to possible doubts as to the Court's appellate jurisdiction. But they ignore the fact that the Commission in this case has not merely acted legislatively to promulgate rules, it has also acted judicially to determine express challenges to the validity of its rules. Moreover, the same imperative First Amendment considerations which favor prompt and definitive adjudication of the legality of the Commission's rules militate against narrow construction of this Court's certiorari jurisdicton. See *Mills* v. *Alabama,* 384 U. S. 214, 220-22 (1966) (Douglas and Brennan, JJ., concurring). See also *Construction La-*

borers v. *Curry*, 371 U. S. 542, 550 (1963); *United States Alkali Export Ass'n.* v. *United States*, 325 U. S. 196, 203-04 (1945).

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